

No. 14,551

IN THE

United States Court of Appeals
For the Ninth Circuit

JAMES J. BENNETT,

Appellant.

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court for the District of Alaska,
Fourth Judicial Division.

BRIEF OF APPELLANT.

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I.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction in the District Court for the District of Alaska, Fourth Division. The appellant was charged in the indictment with the crime of feloniously transporting in Interstate Commerce, to wit: from the State of Texas to the Territory of Alaska, a woman, namely, Marilyn Jean Casey, for the purpose of prostitution, in violation of Title 18, Sec. 2421, U. S. Code, Annotated. Transcript of Record, p. 3.

The appellant entered a plea of not guilty. After a trial by jury he was found guilty of the above de-

scribed offense and thereafter, on May 25, 1954, order and judgment was entered and the appellant was sentenced to imprisonment for five years. Notice of appeal was filed May 25, 1954.

The District Court had jurisdiction to try the case by virtue of the provisions of Secs. 53-1-1 and 53-2-1, Vol. 2, Alaska Compiled Laws, Annotated, 1949.

This Court has jurisdiction of the appeal by virtue of the provisions of Secs. 1291 and 1294 (2), New Title 28, U. S. Code.

II.

STATEMENT OF THE CASE AND QUESTIONS INVOLVED.

1.

FACTS AND CIRCUMSTANCES.

James J. Bennett, the defendant-appellant, his wife, Fern Bennett, Norma Ruth Crosby, Marilyn Jean Casey, Wesley Kehert and Carol Ward left the State of Texas, on or about May 18, 1953, and arrived in Fairbanks, Alaska, on or about June 28, 1953. The party traveled by automobile using three cars, a Cadillac owned by the defendant Bennett, a Mercury, the title to which was in the name of Fern Bennett, and a Buick, owned by Wesley Kehert. Marilyn Jean Casey entered into a life of prostitution shortly after her arrival in Fairbanks. The defendant had no association with Marilyn Jean Casey prior to May 18, 1953, nor any association with her after her arrival

in Fairbanks, except to arrange temporary hotel accommodations for the party upon their arrival in Fairbanks. During the trip the defendant participated in arranging hotel accommodations at the places the parties stopped overnight. Marilyn Jean Casey paid her share of the expenses of the trip.

During the trip the parties traveled together and at numerous places stopped for the purpose of taking photographs of themselves in groups and as individuals. A great number of those photographs were put in evidence during the trial of the case.

Marilyn Jean Casey, the person named as the party illegally transported, testified as a Government witness. Her testimony did not in any degree implicate the defendant Bennett. However, she admitted having made statements while in custody on a charge of a criminal offense committed in Fairbanks or vicinity, to FBI officers and to the United States Commissioner at Fairbanks which did implicate Bennett. These statements were in writing and signed by her and were admitted in evidence as exhibits and went to the jury, together with other exhibits in the case.

The defendant was tried jointly with his wife, Fern Bennett, Norma Ruth Crosby and Wesley Kehert. The defendant and Wesley Kehert were convicted. Fern Bennett and Norma Ruth Crosby were acquitted.

2.

QUESTIONS INVOLVED AND HOW RAISED.**A.**

Whether or Not There Was Sufficient Evidence to Justify a Verdict of Guilty.

This question was raised by a motion made by counsel for the defense at the conclusion of the Government's case, for a judgment of acquittal. TR p. 398, and by the motion for a new trial. TR pp. 7, 8.

B.

Questions Raised on the Admission or Rejection of Evidence.

These questions were raised by objections made at the time of the rulings of the Court.

C.

Questions Raised by the Instructions of the Court and the Refusal of the Court to Give Certain Instructions Requested by the Defense.

**III.****SPECIFICATIONS OF ERROR.****1.**

The Court erred in denying the motion for judgment of acquittal, made at the conclusion of the Government's case, on the ground that there was insufficient evidence to go to the jury to justify a verdict of guilty. TR pp. 398, 408.

2.

The Court erred in overruling the objection of the defendant to the admission in evidence of Government's Exhibit "O". TR p. 261.

The circumstances of its admission in evidence were as follows:

Marilyn Jean Casey, the person named in the indictment as the subject of the unlawful transportation, was called as a witness by the Government. Her attention was called to a prior extra-judicial written statement inconsistent with her present testimony. She was handed a written statement, "Government's Identification 30", six pages in length, signed by herself. TR pp. 58, 59.

Later in the trial this statement was admitted in evidence over the objection of defense counsel, as Government's Exhibit "O".

This exhibit does not appear in full in the record. Miss Casey was questioned regarding parts of the statement by the U. S. Attorney as follows:

"Mr. Stevens: Will you read the last question?

(The reporter read the last question as follows:

'And did you tell the FBI what it says in this statement here, that Wesley Williams said, "I hear you are thinking of turning out", and he said, "if you are, you better come to Alaska with us. Don't fool around with these \$5 tricks, they are getting \$20 up there." Did you tell the FBI that statement?'

A. Yeah, but it wasn't true." TR p. 65.

* * * * *

“Q. They, Jack Bennett and Wesley Williams, discussed crossing the Canadian border on several occasions, while we were on this trip. Both of them stated that they are known by the customs officials and stated that all girls should stay in one car. Before we crossed the line into Canada, I recall that Bennett stopped at a small town where he purchased a plastic set and other groceries.

A. No, I didn't say that.” TR p. 66.

* * * * *

“Q. (By Mr. Stevens): Miss Casey, again from Page 4, it says, ‘Prior to Norma Crosby’s driving across the Canadian Border, it had been discussed by the girls, Norma Crosby, Fern Bennett, Carole and myself that we were to travel to Alaska and work as prostitutes. Norma had knowledge that all the girls were to work as prostitutes. About fifty miles after we crossed the border, we stopped along the highway and changed cars again.’ Did you tell the FBI that statement?

A. Yes, but it wasn't true either.” TR p. 68.

* * * * *

“Q. On page 5, Miss Casey, it states, ‘The first night I worked as a prostitute was June 30, 1953. I worked out of the Southside Bar located on 15th and Cushman. I turned six tricks at \$20 each. I earned \$120. I gave it all to Wesley Williams. Williams, in turn, gave me \$4 back and said If I had the rest of the money I would just spend it. I took the tricks to a cabin located across from the Transient Rooms. This cabin was rented by Wesley Williams from * * * Murphy.’ Would you like to read that, too?

A. No.

Q. Did you tell that to the FBI?

A. Did I?

Q. Yes.

A. Yes, but it wasn't true." TR pp. 72, 73.

After each of the above questions Miss Casey was cross-examined at length by Mr. Stevens as to the circumstances of her signing Government's Identification 30 and as to its contents.

The grounds urged at the trial for the objection to the admission in evidence of Government's Exhibit ("O") were as follows:

"Mr. Taylor. We are objecting to that, your Honor, on the grounds that it was made under duress, threats, promises and was prepared according to the testimony of the witnesses by others than Miss Casey. We don't feel, not sworn to, your Honor, and would have no bearing upon the issues of this case." TR p. 261.

IV.

ARGUMENT.

1.

INSUFFICIENCY OF THE EVIDENCE TO JUSTIFY THE VERDICT.

There was no substantial evidence in the case that the defendant-appellant James J. Bennett transported Marilyn Jean Casey from the State of Texas to the Territory of Alaska, or that he so transported her or aided and abetted in her transportation, for the purpose of prostitution.

Certain facts may be conceded, as follows:

That the defendant made the trip from Texas to Alaska together with his co-defendants, Fern Bennett, Norma Ruth Crosby, and Wesley Kehert. With the party were a girl known as Carol Ward, and Marilyn Jean Casey, named in the indictment as the woman feloniously transported.

The party left Texas on or about June 18, 1953, and arrived in Alaska on or about June 28, 1953; they traveled in three automobiles, a Cadillac owned by defendant Bennett, a Mercury owned by Fern Bennett, and a Buick owned by Wesley Kehert.

Fern Bennett was the defendant's wife.

When these persons left Texas they were all more or less acquainted with one another. They associated freely together; took many photos of one another in groups and individually; the men extended the usual courtesies to the women or girls, which men usually extend to women in like circumstances.

On the trial, twenty witnesses testified against the defendants. Their testimony will be discussed in the order they testified.

Marilyn Jean Casey, TR pp. 25-119, 359, 360

Miss Casey did not testify to a single fact or circumstance tending to establish the guilt of the defendant-appellant, James J. Bennett.

Written statements, made by her before the trial, and inconsistent with the testimony she gave on the

stand, were admitted in evidence as Government's Exhibit "O". The admissibility of this exhibit will be hereinafter discussed.

Henry W. Denike, TR pp. 120-129

This witness testified that he lived in Denver, Colorado. He was the superintendent of the Western Union Telegraph Company there. That on June 22nd he cashed a telegraphic money order for Wesley Kehert at the Denver office. Nowhere in his testimony did he make any reference to the defendant James J. Bennett.

Rita Ellemeier, TR pp. 129-136

This witness was also brought from Denver, Colorado. She testified that she was the manager of the Ranch House Motor Hotel in Denver; that Mr. and Mrs. Kehert registered at her hotel on June 21, 1953. TR p. 133. There were two in the party. This witness made no reference to the defendant James J. Bennett.

Ruth E. Hoffman, TR pp. 137-142

This witness was also brought from Denver, Colorado. She testified that she owned the Royal Motel in Denver; that a registration card filled out by the registrant, showed that J. J. Bennett, wife and family, Odessa, Texas, registered at the Royal Motel in Denver on June 21, 1953; that there were four in the party; that their car was a Cadillac, BB 6235. TR p. 140.

Artie Reynolds, TR pp. 143-151

Artie Reynolds was also brought from Denver, Colorado. He testified that in June, 1953, he worked at Al's Service Station in Denver; that he saw Bennett, the defendant, in Denver in June, 1953; that in the latter part of June he serviced three cars, a Mercury, driven by Bennett, a Cadillac, driven by a lady, and a Buick; he serviced the Mercury and the Cadillac on one day and the Buick the next day; he talked with Bennett the first day they came in; Bennett told him he was from Odessa, Texas.

TR pp. 144-145

The next morning the three cars drove in; he let them park there and he asked the witness to service the Buick; they had been back after it after they got through eating and so they left; that was the last time he saw them when they came back.

TR p. 147

All the servicing he did was charged to the same credit card.

TR p. 148.

William Henry Burton, TR pp. 152-162

Burton testified that he resided at Oliver, B. C., Canada; that he was the Canadian Immigration Inspector stationed at Osoyoos, B. C., Canada, on the Canadian-American Border, and in the course of his duties he checked vehicles as they traveled across the Border; that around the 23rd or 24th of June, 1953, he inspected a car driven by Mr. Bennett, the defendant; that Mr. Bennett was alone at the time; that it

was about twenty minutes to four; that after questioning Bennett, he admitted him in transit to Alaska; that there were two other cars at the Border when he checked Bennett's car, a Cadillac and a Mercury hard-top; that he went off shift at 4:00 o'clock and the last car he checked that night was Bennett's.

TR pp. 152-154

On cross-examination Burton said that he had testified to the time Bennett passed through the Customs by checking back in his own memory; that Osoyoos is two miles north of the Border between Washington and Canada; that he thought he knew Bennett. TR pp. 158-161.

Vern V. Murphy, TR pp. 163-169

Murphy testified that he lived at the Trails End Motel in South Fairbanks, Alaska; he had known Wesley Kehert since 1951, met him at his motel; that in August, 1951, he and Kehert remodeled a quonset hut behind the motel for the purpose of operating a bawdy house; that he met Kehert again about July 1, 1953, at the motel office and Kehert asked him if he had a vacancy in the Trails End Motel; that he did have a vacancy, Cabin No. 12, which was engaged and moved into by Kehert; that Kehert rented that cabin for about three days; that at the end of three days he heard that they were picked up or that there was a raid of some kind; that he read it in the papers; that as far as he, Murphy, was concerned there were no occupants of the room he had rented, it was just Kehert that rented the cabin. TR pp. 163-168.

Murphy further testified that he did not see Bennett at his motel in June, 1953, nor around the first part of July; that he didn't see Mr. Bennett at all; that he didn't see anyone at Cabin No. 12; he didn't see anyone come or go in that cabin. TR p. 169.

Silas M. Packard, TR pp. 170-182

Packard testified that he lived at Tok Junction, Alaska; was United States Immigration Inspector there, his duties being to examine people entering Alaska from Canada and to make reports on persons that go through this station at Tok. Mr. Packard produced page 62 of the records of the United States Immigration and Customs Station, Tok Junction of June 28, 1953. TR pp. 170-171.

Reading from this record Packard testified,

"There was a Texas car, license BW-6235, four door Cadillac driven by James J. Bennett, and an Indiana license car WB-4848, Buick, two door, driven by Wesley Kehert. No other passengers in either of those cars. Then there is a Texas licensed car KS-7118, a Mercury coupe, driven by Fern Bennett, with three other passengers."

Packard testified that it was a normal procedure to ascertain who is driving the vehicles at the Border, and to interview all of the other passengers in the vehicle at the time, but they only kept the names of the drivers; that they were all women in the one car. TR p. 175. Mr. Packard further testified that he could identify the faces of some of the persons listed but was not sure as to which was which; that it was

quite a while ago and at the time he didn't have any reason for attempting to remember them. TR p. 179.

Earl Wyman, TR pp. 182-195

Wyman testified that he was in the photographic business in Fairbanks, Alaska, and developed certain rolls of film at the request of the FBI and printed some of the pictures therefrom.

Howard K. Hudson, TR pp. 195-199

Hudson testified that he was a member of the Armed Forces stationed at Eielson Air Force Base, near Fairbanks, Alaska, in June, 1953. That he met Marilyn Jean Casey at the South Side Bar the latter part of June or the 1st of July; that at that time she was using a 1953 Buick; that he went to the Trails End Motel with Miss Casey; he had sexual relations with her for which he paid 15 bucks. TR pp. 195-197.

Hudson testified that he was subpoenaed to come to Fairbanks from Andrews Air Force Base, Washington, D. C.; that he thought the license plate on the car Miss Casey was driving the night he went with her was Indiana.

That he never knew Mr. Bennett. TR p. 199.

John W. Worsham, TR pp. 200-235, and

Edward J. Harkabus, TR pp. 235-298, 575, 576

These two witnesses were FBI agents at Fairbanks. They testified at length as to the ex-parte statements made by Marilyn Jean Casey to themselves and to the U. S. Commissioner at Fairbanks prior to the trial.

They testified to the contents of said statements and the circumstances under which they were made. They identified numerous rolls of film taken from one or both the defendants, Bennett and Kehert, and some receipts for gasoline purchased by Bennett while en route from Texas to Alaska, and taken from him on the occasion of his arrest on July 6, 1953.

They gave no testimony showing any association between the defendant Bennett and Marilyn Jean Casey after their arrival in Fairbanks.

C. M. Wright, TR pp. 298-333, 511-515

Wright testified that he resided in Odessa, Texas, between April and July of 1953, at the time being a Special Agent for the Federal Bureau of Narcotics; that the first time he met defendant, Bennett, was in Odessa about April 4, 1953. TR pp. 298, 299.

At this point in the course of Wright's testimony, during a consultation between the Court and respective counsel out of the hearing of the jury, Mr. Stevens made an offer of proof as follows:

"Your Honor, the Government offers to prove by this witness that between the time this witness met Mr. Bennett and the time Mr. Bennett came to Alaska he was working as an undercover agent for the Federal Bureau of Narcotics. He was posing as a friend of Mr. Bennett's and had many conversations with him relating to the crime before the court which does not discuss narcotics or any discussion relating to narcotics. Our discussion would be purely relating to the crime before this court, transportation for the purpose of prostitution." TR pp. 299, 300.

Objection to the offer having been overruled, the witness testified as follows:

He and Federal Agent Pizzeni met Jack Bennett, the defendant, and Carolyn Wright at the Mink Club in Amarillo, Texas, sometime in May, 1953, and at that time he had a discussion with Bennett. TR pp. 300, 301. That morning it had been arranged that he and Pizzeni were to meet Jack Bennett that night at the Mink Club, in order to purchase three ounces of heroin.

On motion of the defense, the last statement of the witness was stricken and the jury instructed to disregard all stricken evidence. TR p. 303.

The witness continuing:

He had a discussion with Jack Bennett that morning and Bennett told him at that time that he had to go to Pampa in order to pick up a prostitute that he was—

After objection to this testimony and argument between counsel, the objection was overruled, but the witness, Wright, did not finish his answer. TR p. 307.

The witness continuing:

He saw Jack Bennett again on the 18th of May, 1953, in Odessa; Carolyn Wright was with him. Bennett and himself drove to Big Springs, no one went with them; he had a conversation with Mr. Bennett as they drove to Big Springs. Jack Bennett told him that he was going to take his girls back up to Anchor-age and how much money he could make there through the girls he would take up there, and revealed to him

some of the things that happened at his prior time, trip to Anchorage. TR pp. 307-309.

When they returned from Big Springs he saw Norma Crosby, Betty Bennett and Steve Williams at Jack Bennett's apartment at the Arrowhead Courts in Odessa, and had a discussion with them, all of them except Steve Williams; Carolyn Wright, Jack Bennett, Norma and Betty Bennett all were at the apartment. TR p. 309.

Jack was telling them how much money could be made in Alaska, and while they were talking Williams drove up in an Odessa Steam Laundry truck; he, Wright, made another trip with Bennett to Lubbock, on May 20, 1953; Norma, the red-headed girl, was with them; Norma had one black eye and one side of her face was bruised very badly with a long scratch down it; Witness asked her how this appearance came about.

At this point in Wright's testimony, upon objection to the question, Mr. Stevens made another offer of proof out of the hearing of the jury, as follows:

"Your Honor, the offer is that the answer by the defendant Crosby was that she told this witness that she had been worked over by Jack Bennett because she had been prostituting for nothing, and that after Mr. Bennett got out of the car the conversation continued and that she, the defendant Crosby, discussed prostitution openly and freely with this witness."

TR pp. 310, 311

To the foregoing offer of proof the objection of the defense was sustained, but the matter is inserted here

for the purpose of showing the disposition of the witness Wright to blacken the defendant Bennett.

The witness continuing:

He had known Mr. Bennett for sometime in Odessa, and had seen him on several occasions, not to meet him personally at all; that during the period he heretofore discussed he saw him very often, every two or three days, at least.

TR pp. 314, 315

That he saw Bennett and other defendants about the 18th of June at Bennett's apartment in the Arrowhead Courts in Odessa, Texas, and had a discussion with them; there were present Jack Bennett, himself, Carolyn Wright, Betty Bennett and Norma; the conversation was about their activities at the place; they were working at the Highway Auto Courts where they were prostituting; Jack Bennett was talking to Carolyn Wright and he told her he had a place in Las Vegas, Nevada, at the Sand Hotel.

TR pp. 312, 313

Counsel for defendant at this point objected to the last answer of the witness. The Court sustained the objection. However, the jury heard it. This matter is inserted to show the disposition of Mr. Wright to portray Bennett to the jury as a man of bad character.

The witness continuing:

Mr. Bennett discussed the trip to Alaska before him, Wright, that they subsequently took.

“By Mr. Stevens:

Q. What was the part of the discussion that you had that night on the 18th of June that per-

tained to Alaska, leaving out any reference to Nevada?

A. Well, he told Carolyn that he would leave her at this place on their way to Alaska, about how much money could be made there."

TR pp. 313, 314

Mr. Wright left out the word "Nevada" but accomplished his purpose.

The witness continuing:

He was doing no other work than that in relation with the Federal Bureau at the time under discussion; he had a business prior to that time; he owned a finance company and a motor company.

Wright further testified that he only drank Bennett's whiskey when he was trying to purchase narcotics.

TR p. 322

He testified that when the party left Odessa he didn't know what direction they took; that the Texas Rangers were after them; that they left for Houston; they lost track of them until they were picked up in Fairbanks.

TR pp. 324-325

That in a discussion with Bennett about his trip to Anchorage, Bennett told him how much money he could make from his girls prostituting in Anchorage.

TR p. 327

Wright testified that he was not working with the Sheriff's Department in Odessa, Texas; that he was trying to stay out of their way.

TR p. 328

He testified that he was dodging the Sheriff on the 18th of June, 1953; that Jack Bennett was buying them off to let his girls operate; that he didn't want the Sheriff to see him with Bennett for fear they might tell him who he was.

TR p. 329

He testified that Jack Bennett had accused him of being an agent several times, but wouldn't have took him in to the people he did if he had known he was an agent.

TR pp. 329-330

He testified that the trips he took with Bennett were to purchase narcotics; that they were not successful.

TR p. 331.

Barbara Rogers, TR pp. 333-337

This witness did not testify to any fact or circumstance material to the charge in the indictment or relating to the defendant James J. Bennett at all, except that a man was introduced to her as Mr. Bennett in a night club in Anchorage.

N. D. McCown, TR pp. 339-353

This witness was brought to the trial from Galveston, Texas. He testified that he and his partner Tony Cifu saw Marilyn Casey at 2710 Post Office Street in Galveston on June 14, 1953; that house was known to him as a house of prostitution; at that time she propositioned him; asked him if he wanted it.

TR pp. 347-348

McCown was shown a picture and recognized the girl in the picture as the girl he had seen in Galveston, referred to in his previous testimony.

TR pp. 348-349

Harold F. Prosser, TR pp. 354-355

Prosser testified that the picture recognized by N. D. McCown as Marie Sheridan was identical to the picture of Marilyn Jean Casey taken in the Federal Jail.

TR p. 355

Beulah Whispell, TR pp. 360-365

This witness testified that she was the owner of the 5th Avenue Hotel located at 637 Fifth Avenue, Fairbanks, Alaska; that she was operating that hotel in June and July of 1953 and kept records and registrations of persons staying at her hotel; her records showed that a party of four came to her hotel together and remained there until they were arrested; that they were arrested; that it was her understanding that Bennett's wife occupied the same room as Bennett and the other two girls had another room; that the other two girls gave their names as Norma Barkly and Mary An Persine; that they were registered from Odessa, Texas.

Walter R. Brown, TR pp. 367-390

This witness was brought from Odessa, Texas. He testified that he lived in Odessa, Texas, in June 1953; that he knew James Bennett and Betty Bennett.

This witness was shown Government's Exhibit "R", a picture of Marilyn Jean Casey, and testified he had seen that girl come by the Highway 80 Courts in Odessa, Texas, once or twice, with Mr. Bennett; he knew other girls at the Highway Courts, not with Mr. Bennett; he saw a girl Sharon there with Betty Bennett; he portered part-time at the Highway 80 Courts.

TR pp. 367-368

Over the objection of defendants' counsel, the witness testified:

Betty Bennett was a prostitute at the Highway Courts; he didn't have any connection with her; he derived money from these prostitution activities; while the main porter was gone he went up and asked Betty for it; he had it coming from dates; he would send guys around to the other porter and he would take them around; he got money from Betty Bennett once.

TR pp. 369-370

The witness pointed out and identified the defendant Betty Bennett and also the defendant Norma Crosby as the girl he knew as Sharon.

TR p. 370

The witness testified that all he knew about Mr. Bennett while he, Brown, was there, was that Bennett was some kind of a used car dealer; that he was buying cars and selling them in Lubbock; he had seen him driving several different cars, an Oldsmobile once or twice, and a Cadillac once or twice, he saw a two-tone

Mercury, a new Mercury at the Highway 80 Courts once or twice.

TR p. 371

Cross-examination:

Mr. Brown testified that he never was employed at the Highway 80 Courts, he just worked there part-time to help another boy.

TR p. 372

He testified that the Highway 80 Courts was an auto court, a motel.

TR p. 373

He did not remember when he first saw Betty Bennett at the Highway 80 Courts; he seen her there once or twice; he just stopped there with her car; from the time he went to work there in 1952 up until the time he came to Fairbanks, he saw Betty Bennett about twice at the Highway 80 Courts; he never saw her there with Mr. Bennett.

TR p. 374

He heard Mr. Bennett say once or twice that he was going to pick up some cars the next day; he understood that his business was selling cars; he came to the Highway Courts once or twice to spend the night; that was the only time he saw Mr. Bennett.

TR p. 375

He testified that he was not still working there; that he quit about November or October last year (evidently referring to 1953).

TR p. 376

He saw Mrs. Bennett a couple of times at the Highway 80 Courts during the period he worked there; Mr. Bennett stayed there one night and one night he just came by; those were the only two times he ever saw Bennett; he recognized him in the courtroom from the time he came out there to Highway 80 Courts; the night he stayed there he talked to him; he knew he gave Bennett room 7.

Bennett told him he had just bought that Oldsmobile, was going to put it up on a lot in Lubbock or Amarillo somewhere; that was the only time he talked to Betty.

TR pp. 380, 381

He got some money from Betty Bennett one time. He had gotten money from other people who had come to the motel; the other guys told him to go around and collect some money; that is what he did; he collected \$25-30 dollars; he didn't know what they owed; he didn't get any of that; was supposed to but didn't; the other porter went to eat, took the money with him and he was left holding the bag; he didn't know what the money was for; he didn't ask the man that sent him to collect; if they wanted liquor at the motel he would get it for them. They had no liquor at the motel; there was a little bootlegging on the side.

TR pp. 382, 383

On redirect examination the witness was shown Government's Identification 55. He testified that he recognized it as a statement signed by him; he believed that the date on the front page was the right date;

he didn't put the dates on the statement; Mr. Wright put them down in Odessa; he saw one thing in there about some other girl; he meant that he told them he didn't know anything about her but he got it down that he did.

TR pp. 386-388

On recross-examination Marilyn Jean Casey was called and entered the courtroom. The witness was asked to look at her and state whether he had ever seen her before. The witness testified that he had never seen her.

TR pp. 389, 390

The foregoing summary of the Government's case includes everything that his counsel could glean from the record relating to the appellant James J. Bennett. It includes all the testimony against him, whether or not relevant and material to the crime charged in the indictment. It shows an attempt by the prosecution to prove that Bennett was a bad character, was involved in criminal activities, the sale of narcotics and prostitution. When Government witness, C. M. Wright, was introduced to the jury as an FBI narcotic agent, a prejudice against Bennett was at once created. The ordinary jury is prejudiced against dope peddlers, even more so than against white slavers.

The witness Wright did not succeed in connecting Bennett with any illegal activity of any kind. He took the stand in his own defense. His testimony comprises sixty-six pages of the typewritten record. On cross-examination the United States Attorney went into his

whole past life and did not succeed in proving a single illegal transaction.

On the contrary Bennett's testimony establishes that he was born in Texas, lived most of his adult life in Odessa, was a used car dealer, owned his home and other property, had credit with the Motor Investment Company, 808 Seventh Street, Fort Worth, Texas, dealt with the Lincoln-Mercury people and several other corporations, and had credit with them. He had gasoline credit courtesy cards; he was in good standing with the firms and corporations he had dealt with for a couple of years prior to the trip to Alaska, which resulted in his arrest.

He was born in Texas and lived most of his life in and around Odessa, except a period of five years, during which he lived off and on in Anchorage, Alaska, where he drove taxi cabs. The prosecution, according to the record combed his activities both in Texas and in Alaska, in an effort to find something in his record reflecting upon his character, and were unable to discover that he had ever been even charged with any offense until the indictment in this case was brought against him. They were unable to prove that the appellant has ever had any connection or association with Marilyn Jean Casey before or after she came to Alaska.

This being the status of the case against Bennett, the prosecution sought to prove his guilt by introducing in evidence, ex-parte statements of Miss Casey, made prior to the trial and not in the presence of Bennett. These ex-parte statements of Miss Casey

were not admissible in evidence for any purpose and were not evidence against Bennett.

During the trip from Odessa to Alaska, the appellant used his own name and his wife's name at all the places where the party stopped, and in crossing the border from the United States to Canada and in crossing the border from Canada into Alaska. He had proper identification for himself, his wife, and his automobile. He had nothing whatever to do with Marilyn Jean Casey, before the trip, during the trip nor after the party arrived in Fairbanks. The Motion for Judgment of Acquittal should have been granted.

2.

ERRORS IN THE ADMISSION OF EVIDENCE.

Error is assigned on the admission in evidence of Government's Exhibit "O".

Specification of Error 2.

Exhibit "O" consisted of a series of prior, ex-parte statements made by the Government witness Marilyn Jean Casey. While on the stand she denied the truth of those facts of her prior statements, which tended to establish the guilt of the defendants.

The prosecuting attorney was permitted to treat Miss Casey as an adverse and recalcitrant witness and to cross-examine her at great length regarding her prior inconsistent statements.

In *U. S. v. Block, et al.*, 88 F. (2d) 618, prior statements of a recalcitrant government witness were allowed to be put in evidence. The trial judge instructed the jury not to consider any part of the statement not admitted by the witness.

The Appellate Court (L. Hand, Circuit Judge) in its opinion stated:

“The judge’s charge mended nothing; he left the jury to disentangle in their minds the innocuous part which the witness had conceded, from the great bulk which he had disaffirmed. The hearsay remained as effective as before, and really the prejudice was incurable anyway, whatever he might have said.”

U. S. v. Block, supra, pp. 619, 620.

Following the above, the Appellate Court further stated:

“For this reason the conviction of Levy cannot stand, though there was enough other evidence to sustain a verdict against him.” Opinion (3-5) p. 620.

And the opinion proceeds to draw the distinction between other evidence sufficient to support a conviction and other evidence overwhelmingly establishing the defendant’s guilt. The opinion concedes the error in the admission in evidence of prior inconsistent statements, and holds the error prejudicial because the other evidence in support of the conviction of the defendant Levy was not overwhelming, and the original inconsistent statement of the recalcitrant govern-

ment witness, David Block, may have “turned the scale.”

In the present case the prior inconsistent statements of the Government witness Marilyn Jean Casey were not only erroneously admitted in evidence but admitted as an exhibit in the case and went to the jury as Exhibit “O”. Although pure hearsay they went to the jury as substantive evidence, and were not supported by other evidence sufficient to support a conviction, and the error could not have been “mended” by the judge’s charge, Instruction 9, TR p. 526, nor by any amount of mending instructions.

The error could not be cured. *DeGroot v. United States*, 78 P. (2d) 244, (4, 5), (6) pp. 249, 250.

Kuhn v. United States, 24 P. (2d) 910 (9th Circuit) is exactly in point.

In that case a recalcitrant government witness was examined at great length by the prosecution, as detailed in the opinion, in the same manner as was done in the present case. However, in the *Kuhn* case, the district attorney of his own motion “consented that all objections be sustained, and that all the testimony be withdrawn from the consideration of the jury”, and therefore the Court struck out the testimony, with an admonition to the jury not to consider it, and again in the final instructions explicitly so advised the jury. The Court further stated in the opinion,

“While, in view of these repeated admonitions and the other circumstances of the case, we are unable to believe the original error was prejudi-

cial. We deem it proper to express our disapproval of the practice here indulged.”

Kuhn v. U. S., supra, page 913 (1-3).

In the present case the objectionable testimony was not only not withdrawn and the “original error” cured as far as possible, but on the contrary the original error was aggravated as far as possible by the admission of the objectionable testimony as an exhibit, to remain with the jury at all times during their deliberations, and as over-emphasized substantive evidence. As far as the circumstances of the case are to be considered, there was no evidence in the case relating to the appellant, James J. Bennett, that was not consistent with his innocence of the crime charged in the indictment, except the objectionable prior inconsistent statements of Marilyn Jean Casey. The opinion in the *Kuhn* case concedes the admission of this class of testimony to be error, but in view of the repeated admonitions of the Court and other circumstances of the case, not prejudicial error. In the present case there were no admonitions, and no other circumstances curing the error.

The objection urged by defense counsel to the admission of Government’s Exhibit “O” was that it was made under duress, threats, promises, etc. The objections urged in this argument were not included. The questions of duress, etc., are not discussed in this argument. The errors in the admission of Exhibit “O”, and the circumstance of its admission, are so egregious that counsel for defense deem it within the power and duty of this Appellate Court to hold the

error prejudicial. To discuss the question of duress, would require an analysis of many pages of testimony. Counsel feels safe in assuming that such an analysis is unnecessary.

Eliminating the erroneously admitted Government's Exhibit "O" from consideration, there was nothing left in the record to support a conviction of the appellant James J. Bennett.

The judgment of the lower Court should be reversed.

Dated, Anchorage, Alaska,

November 7, 1955.

GEORGE B. GRIGSBY,

Attorney for Appellant.